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In The

Supreme Court of the United States

October Term, 1993

THE STATE OF IDAHO, MACK W. RICHARDSON, Director of the Department of Law Enforcement, and DOES I through V,

Petitioners,

v.

JOSEPH P. ARNZEN,

Respondent.

Petition For A Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Idaho Supreme Court misapplied federal constitutional standards by holding that a public employer must give notice and an opportunity for hearing prior to making a decision to initiate termination proceedings against a tenured employee.

2. Whether the Idaho Supreme Court's decision conflicts with the constitutional standard established by the Ninth Circuit Court of Appeals that employees who fail to avail themselves of established administrative procedures cannot claim a denial of their right to procedural due process.

3. Whether the Idaho Supreme Court's creation of a new procedural due process right is reconcilable with a denial of qualified immunity.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, State of Idaho and Mack W. Richardson, in his official capacity as the Director of the Idaho Department of Law Enforcement, and also in his individual capacity, and Respondent Joseph P. Arnzen.

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THE STATE OF IDAHO, MACK W. RICHARDSON, Director of the Department of Law Enforcement, and DOES I through V,

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JOSEPH P. ARNZEN,

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Petition For A Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, State of Idaho and Mack Richardson, in his official and individual capacities, respectfully pray that a Writ of Certiorari issue to review or summarily reverse the judgment and opinion of the Idaho Supreme Court entered in the above-entitled proceeding on May 13, 1993. A Petition for Rehearing of that judgment and opinion was denied, July 13, 1993.

OPINIONS BELOW

The opinion of the Idaho Supreme Court is reported at 854 P.2d 242 (1993), and is reprinted in the Appendix hereto as A1-20, *infra*.

The memorandum decisions of the district court of the second judicial district of the State of Idaho, in and for the County of Lewis (Honorable Ron Schilling, district judge), have not been reported. They are reprinted in the Appendix hereto as A21-23 and A24-27, *infra*.

JURISDICTION

The opinion of the Idaho Supreme Court was entered on May 13, 1993. A petition for rehearing was denied July 13, 1993. The jurisdiction of this Court is invoked under 28 USCS § 1257.

STATUTES INVOLVED

42 USCS § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress

> applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Idaho Code § 67-5315. Establishment and Adoption of Employee Grievance Procedure. *See* Appendix A30-32. Idaho Code § 67-5316. Appeal Procedure. *See* Appendix A33-37. 28 IDAPA § 19.A.2.a.

> An appointing authority may suspend with pay an employee for investigation of disciplinary causes enumerated in Rule 19.A.1. Each suspension for investigation shall be superseded by reinstatement to duty, dismissal or disciplinary suspension within thirty (30) calendar days of the suspension for investigation or within such extension of time approved by the Personnel Commission.

28 IDAPA § 19.A.5.a.

> Whenever an appointing authority considers it necessary to take disciplinary action against an employee, he or she shall notify the employee and the state personnel director concurrently in writing; and shall set forth the specific rule(s) violated and the reasons for the action. Suspensions with pay for investigation (ref. Rule 19.A.2.a) may be made without prior notice to the employee; in this case, the appointing authority shall notify the state personnel director as soon as practical.

28 IDAPA § 20. Grievances and Appeals. *See* Appendix A38-51.

STATEMENT OF THE CASE

Joseph Arnzen filed a complaint in the district court of Idaho on October 10, 1990, alleging that his resignation as an employee with the Idaho Department of Law Enforcement violated state and federal law. Defendants named in the original complaint included the State of Idaho and Mack W. Richardson, in his official capacity as Director of the Department of Law Enforcement. Prior to answering the complaint, the Defendants filed a motion for summary judgment on the grounds the complaint failed to state a claim under state or federal law. On December 20, 1990, the Plaintiff filed an amended complaint which included a claim under 42 USCS § 1983 against Defendant Richardson in his individual capacity. Defendants then renewed their motion for summary judgment. The trial court dismissed all § 1983 claims against the State of Idaho and Richardson in his official capacity, as those Defendants are not persons amenable to suit under the Act. The court also dismissed all state law claims, as the Plaintiff had failed to exhaust the administrative remedies made available through the Idaho Personnel Commission Act. Although the trial court initially denied summary judgment regarding the individual capacity claims against Richardson, upon hearing a motion for reconsideration, summary judgment was granted on the basis of Richardson's entitlement to qualified immunity. The Plaintiff then filed an appeal with the Idaho Supreme Court on October 23, 1991. The Idaho appellate court affirmed the dismissal of the state law claims, but reversed the trial court's ruling that Richardson was entitled to qualified immunity. A motion for

reconsideration was filed, but denied by the court on July 13, 1993.

The employment controversy in this case focuses upon an event which occurred on October 18, 1989, wherein Arnzen was issued a misdemeanor citation by the Idaho Fish and Game Department for attempting to kill a deer with the aid of an artificial light. He subsequently pleaded guilty and received a fine. As director of the Idaho Department of Law Enforcement, Defendant Richardson was advised that Arnzen had been charged, and convicted. He felt Arnzen's conduct was improper, and considered taking disciplinary action against him. Before making a decision regarding whether disciplinary proceedings would be instituted, Richardson ordered an internal affairs investigation to ascertain the circumstances of Arnzen's arrest and subsequent conviction. During the fourteen day investigation, Arnzen was placed on administrative leave with pay. He was also interviewed, and he provided a written statement to the investigators.

After the investigation was completed, and a report was provided to Richardson, he concluded that Arnzen's actions constituted conduct unbecoming a state employee, or conduct detrimental to the good order and discipline of the department. In order to determine what discipline would be legally permissible under state and federal law, Richardson consulted with his staff attorney. He was advised that "cause" existed to discharge Arnzen. Richardson also requested and obtained recommendations from Arnzen's supervisors, Colonel Rich Humphreys and Captain Ron Moore. After considering this

information collectively, Richardson concluded that Arnzen's actions justified termination.

In order to commence the discharge process, Richardson drafted a letter, dated November 3, 1989, advising Arnzen that because of his criminal conviction, the department intended to seek his dismissal. However, acting upon the recommendation of his staff attorney and Arnzen's supervisors, Richardson decided to afford Arnzen the opportunity to resign his position rather than face termination proceedings. Accordingly, Richardson instructed Arnzen's immediate supervisor, Captain Ron Moore, to travel to Arnzen's personal residence and inform him of the department's decision. Acting upon these instructions, on November 3, 1989 Captain Moore travelled to Arnzen's home, and informed him that the Boise office had decided to seek his termination. At that time, Arnzen was presented with the option of resigning his position. Mr. Arnzen then signed a prepared letter of resignation. Because he resigned, Arnzen was never served with a copy of the November 3, 1989 letter of termination.

Following the resignation, Arnzen failed to file a grievance contesting any of the circumstances relating to his severance from the department. According to his sworn testimony, he failed to pursue a grievance because he believed he was no longer entitled to do so due to the fact he no longer had a supervisor, as he was no longer employed by the department.

On February 5, 1990, Arnzen filed a notice of claim with the Secretary of State, in accordance with the Idaho Tort Claims Act. On February 16, 1990, the Plaintiff,

through his attorney, was notified by the State that because he had not availed himself to the grievance procedures of his department and the Idaho Personnel Commission Act, the state could not consider his claim for damages. At the request of Plaintiff's attorney, on March 26, 1990, a copy of the Department of Law Enforcement's grievance procedures was provided. Approximately two months later, on June 4, 1990, the Plaintiff filed a grievance with the Department of Law Enforcement seeking reinstatement to his prior position. The grievance was denied by the department as being untimely the same day it was received. This denial was never appealed to the Idaho Personnel Commission.

REASONS FOR GRANTING THE WRIT

I.

The Idaho Supreme Court's ruling improperly interprets the Fourteenth Amendment and *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), to require a due process hearing prior to the time a decision is made to institute discharge proceedings.

In the Idaho Supreme Court's May 13, 1993 opinion, it was concluded, as a matter of law, that Plaintiff Joseph Arnzen's constitutional right to procedural due process was violated. *See* 854 P.2d at 248; A13-14. The basis of this ruling was the conclusion the Plaintiff's constitutionally protected property right to continued public employment was impaired when Defendant Mack Richardson drafted

a letter notifying Arnzen that the Department of Law Enforcement intended to seek his dismissal.[1]

The Idaho Supreme Court ruled that *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), required the Plaintiff be afforded a due process hearing prior to the time the letter was drafted. *See* 854 P.2d at 248; A13-14. The court came to this conclusion despite the fact Arnzen was interviewed by internal affairs investigators, and he provided a written statement explaining the circumstance of his arrest and conviction prior to the time Richardson drafted the offending letter. The Idaho court also failed to consider the Idaho Legislature, through the Personnel Commission Act, had created a grievance procedure whereby state employees could forestall and contest any proposed discipline. *See* Idaho Code § 67-5315.

Pursuant to Idaho Code § 67-5315(2), when an employee files a grievance, the proposed discipline is tolled until the employee completes his department's established grievance procedure.[2] Under the state statutory scheme, the employer is required to provide written

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[1] Under the Idaho Personnel Commission Act, Idaho Code § 67-5301, *et seq.*, and the rules and regulations of the Idaho Personnel Commission, state agencies are required to provide an employee written notice of contemplated disciplinary action which must outline the nature of the charges, the discipline sought, and a brief explanation of the evidence the employer is considering. *See* 28 IDAPA § 19.A.5.a. The termination letter in the present case is the notice mandated by the Personnel Commission.

[2] The Idaho Personnel Commission, through its regulatory authority, created a uniform grievance procedure. *See* 28 IDAPA § 20.A.1 – .9. The Department of Law Enforcement promulgated a grievance procedure which the Plaintiff acknowledged, in

notification of the contemplated discipline. 28 IDAPA § 19.A.5.a. The notice functions as a triggering mechanism to the grievance process, as the employee must then file a grievance within five working days. 28 IDAPA § 20.A.2.[3]

The grievance procedure entitles the employee to have his or her case heard by an impartial review panel.[4] Once the grievance hearing is conducted, the panel issues a written decision explaining to the department head the issues involved in the grievance, the facts believed to be true by the panel, and an analysis and recommendation for a final response by the department. *See* 28 IDAPA § 20.A.6. After the department head receives the impartial review panel's written decision, the panel's recommendations may be accepted or rejected in whole or in part. Assuming the department head chooses to proceed with the proposed discipline, the decision becomes final, subject to further appeal to the Idaho Personnel Commission.

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writing, to have reviewed prior to the time Mr. Richardson sought his dismissal. *See* R 169-72.

[3] This Court, in *Texaco v. Short*, 454 U.S. 516 (1982), and *U.S. v. Locke*, 471 U.S. 84 (1985), upheld the constitutionality of statutes providing for the automatic extinguishment of a vested property right upon satisfaction of certain statutory conditions. The Idaho Personnel system is not as harsh as the statutes involved in *Locke* or *Short*, as the employee is notified that adverse action affecting his property rights is pending. Requiring the employee to request a grievance, thereby tolling the discipline, would not impose an unfair burden.

[4] The members of the panel are selected from lists maintained by the Idaho Personnel Commission. The panel members cannot be employees of the grievant's department. *See* 28 IDAPA § 20.A.3.

Therefore, under the procedural protections provided by state law, Arnzen's dismissal was not final when the November 3 letter was signed. The proposed discharge became final after Arnzen chose to forego a grievance by resigning his position.

Under the Idaho court's interpretation of the Fourteenth Amendment, an employer must provide notice and hearing prior to the time the decision is made to institute discipline, rather than prior to the time an employee's benefits, *i.e.*, pay, are taken away. The logical flaw in this approach is that in the beginning of every employment controversy, the employer will become aware of conduct by the employee which he feels may justify some form of discipline. Depending upon the circumstances of a given case, the employer may, at that time, decide to impose discipline. Alternatively, the employer may decide to conduct additional investigations, or simply contemplate the situation further before deciding whether disciplinary action should be taken. Under the Idaho court's interpretation of the Fourteenth Amendment, the procedural due process clause would be implicated when the employer first entertains the thought of disciplining an employee. Under this expansion of federal law, a due process violation would occur in virtually every case where a public employee is discharged because, as a practical matter, notice and hearing could not be provided prior to the time the government employer makes the decision to institute discharge proceedings.

The legal error in the Idaho court's ruling is its failure to balance the competing interests in an employment controversy by refusing to take into account the

government's interests in the expeditious removal of an unsatisfactory employee, the avoidance of administrative burdens, and the risk of erroneous determinations. *See Loudermill,* 470 U.S. at 542-43. *See also Matthews v. Eldridge,* 424 U.S. 319 (1976). A more reasoned and logical approach to pre-termination due process would require the employer to provide the employee with notice and an opportunity to be heard after the employer has made an initial decision to seek the employee's discharge, but before the time the employee's pay is suspended. By doing so, the employer has the opportunity to carefully consider discharging an employee without fear of violating the federal constitution, and the employee is given the opportunity to respond to any charges prior to being deprived of any benefits of his employment.

This approach has been adopted by the appellate courts in the Ninth, Eighth, Fourth, and Third Circuits. *See Bignall v. North Idaho College,* 538 F.2d 243 (9th Cir. 1976); *Jackson v. St. Joseph State Hospital,* 840 F.2d 1387 (8th Cir.) *cert. denied,* 488 U.S. 892 (1988); *Vance v. Chester County Board of School Trustees,* 504 F.2d 820 (4th Cir. 1974); *Chung v. Park,* 514 F.2d 382 (3rd Cir.) *cert. denied,* 423 U.S. 948 (1975). In these cases the courts ruled that due process does not require an employee be afforded a hearing prior to any decision to terminate. Instead, a hearing must be provided prior to a termination of benefits.

This approach is implicit in this Court's prior rulings applying the Due Process Clause in the predeprivation setting. In *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971), it was concluded that the "root requirement" of the Due

Process Clause is that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest. . . . " (Emphasis in original.) However, even this root requirement is waived in "extraordinary situations where some valid governmental interest is at stake which justifies postponing the hearing until after the event." *Id.* In *Loudermill*, this Court recognized that a tenured public employee should be given the opportunity to "invoke the discretion of the decision maker . . . *before the termination takes effect.*" 470 U.S. at 543 (emphasis added). In balancing the competing interests to this question, the Court wrote:

> Affording the employee an opportunity to respond prior to the termination would impose neither a significant administrative burden, nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employee would continue to receive the benefit of the employee's labors. . . . Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

Id. at 544. Addressing the form of the pre-termination hearing, the court cautioned that the hearing "need not be elaborate or definitively resolve the propriety of the discharge." *Id.* at 545. Due process is satisfied if the employee is given "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546.

In the present case, Arnzen was afforded two distinct opportunities to present his side of the story. The undisputed facts establish that after he was suspended, with pay, he was interviewed by internal affairs investigators, and he was also allowed to make a written statement explaining his actions.[5] Secondly, after Mr. Richardson made the decision to institute termination proceedings, state law afforded him a grievance procedure to forestall and contest his proposed discharge. Based upon these facts, Richardson's actions did not deprive Arnzen of a federal right to due process.

In order to support its conclusions, the Idaho Supreme Court improperly expanded federal law to require notice and hearing under *Loudermill*, before a decision is made to institute termination proceedings. If the Idaho court's ruling is not reversed, the disciplinary grievance procedure within the state of Idaho, which serves thousands of public employees, will be rendered unconstitutional. This result would have nationwide implications, as the notice and hearing provisions within the Idaho Personnel system are similar to those which exist in many states.[6] For these reasons, this Court should

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[5] In his concurring opinion, Justice Bakes recognized that Arnzen gave a written statement. The justice then indicated that the content of the statement may satisfy the *Loudermill* notice and hearing requirements. 854 P.2d at 250; A20. The content of Arnzen's written statement would be irrelevant to determining whether he was afforded a meaningful opportunity to respond. The focus upon the content of the statement simply illustrates the court's improper interpretation of federal law.

[6] Ala. Code § 36-26-27; Cal. Code § 19574; Colo. Rev. Stat. § 24-50-125; Conn. Gen Stat. §§ 5-202, 5-240, 5-266d; Del. Code

grant *certiorari* to resolve the question of whether the notice and hearing requirements in *Cleveland Board of Education v. Loudermill, supra,* are implicated prior to the time a decision is made to seek an employee's termination. Alternatively, this Court should summarily reverse the Idaho Supreme Court's ruling as an improper interpretation and application of federal law.

II.

The Idaho Supreme Court's finding of a violation of procedural due process where an employee fails to utilize established administrative grievance procedures conflicts with established precedent in the Ninth Circuit Court of Appeals.

The undisputed facts of this case establish that on November 3, 1989, Plaintiff Joseph Arnzen signed a letter of resignation, thereby terminating his employment with the Idaho Department of Law Enforcement. As a result,

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Ann., 29 § 5830; D.C. Code §§ 1-603.1, 1-606.4, 1-617.3; Ga. Code § 45-20-8; Hawaii Rev. Stat. §§ 76-46, 76-47; Ill. Ann. Stat. ch. 20, § 415/8b.16; Ind. Ann. Stat. §§ 4-15-2.5-8, 4-15-2-34, 4-15-2-35; Iowa Code Ann. §§ 19A.9, 19A.14, 19A.19; Kan. Stat. § 75-2949; Ky. Rev. Stat. §§ 18A.095, 18A.105; Me. Rev. Stat. Ann. §§ 5-70-51, 7081-84; Mass. Ann. Laws ch. 31, § 41; Minn. Stat. § 43A.33; Miss. Code §§ 25-9-127, 25-11-109; Mo. Rev. Stat. § 36.380; Mont. Code Ann. § 2-18-1011; Nev. Rev. Stat. Ann. §§ 284.385, 284.390; N.J. Stat. Ann. §§ 11A:2-13, 11A:2-20; N.Y. Consol. Laws § 75; N.C. Gen. Stat. § 126-35; N.D. Cent. Code § 34-11.01-04.2; Ohio Rev. Code § 124.34; Okla. Stat. tit. 74, §§ 841.13, 841.17.B; Or. Rev. Stat. §§ 240.555, 240.560; Pa. Stat. tit. 71, §§ 741.807, 741.950, 741.951; R.I. Gen. Laws §§ 36-4-38, 36-4-42; Tenn. Code Ann. § 8-30-326; Utah Code Ann. § 67-19-18; and, Wash. Rev. Code § 41.06.170.

he chose to forego the filing of a grievance because he believed he no longer had a supervisor. 854 P.2d at 245; A5. Arnzen has never contended that his supervisor, Captain Ron Moore, employed any intimidating or coercive tactics to obtain his resignation. 854 P.2d at 244-45; A2-5. Captain Moore was simply instructed by Richardson to travel to Arnzen's personal residence and inform him that the department had completed its investigations and had made the decision to institute discharge proceedings against him. Captain Moore was specifically instructed to afford Arnzen the option of resigning rather than responding to the proposed discharge. 854 P.2d at 244-45; A3-5.

In *Bignall v. North Idaho College*, 538 F.2d 243, 247 (9th Cir. 1976); and *Correa v. Nampa School District No. 131*, 645 F.2d 814, 817 (9th Cir. 1981), the Ninth Circuit Court of Appeals held that where adequate administrative procedures exist, an employee cannot claim a denial of procedural rights when he or she has elected to forego a complete administrative hearing. In *Bignall*, a college teacher claimed the state had violated her right to due process when the president of the college made the decision to eliminate her position in order to comply with a directive from the school's board of trustees to eliminate two full-time teaching positions. *Id.* at 245. Through a preliminary injunction issued by the federal district court, the teacher was afforded a hearing before the board of trustees. After beginning the hearing process, the plaintiff withdrew from the proceedings and pursued her claim in federal court, arguing the college was required to provide her with notice and hearing prior to

the time the president had targeted her position for elimination. *Id.* The Ninth Circuit agreed the teacher was entitled to a pre-termination hearing, but ruled:

> . . . [W]e have held that were an adequate "administrative remedy . . . was not designed to be remedial, . . . (but) (i)nstead, . . . provide(s) a means of forestalling a threatened future deprivation of civil rights," the plaintiff must run the procedural gauntlet. [Citations omitted.]

Id. at 246. Because the plaintiff was afforded a process by the State to forestall or toll the adverse personnel action, the court concluded she could not complain of a procedural due process violation when she voluntarily chose to forego the available administrative procedures. In *Correa v. Nampa School Dist. No. 131, supra,* the court reaffirmed its holding in *Bignall* by ruling an employee could not maintain a claim under the procedural due process clause when she elected to forego the school district's administrative procedures and pursue a Title VII claim through the Office of Civil Rights. 645 F.2d at 816-17.

In the present case, the state personnel system, through Idaho Code § 67-5315(2), provided Arnzen with an administrative process which would have forestalled, and could have reversed any threatened deprivation of his right to continued public employment. The filing of a grievance would have delayed his discharge until the administrative procedures within his department were completed. *Id.* The Idaho court ruled, as a matter of law, that Arnzen failed to exhaust his administrative remedies by failing to pursue a grievance and, for that reason, his state law claims for wrongful discharge were barred. *See* 854 P.2d at 249-50; A16-19. Despite this ruling, the court

allowed Arnzen to proceed under federal law by claiming he was not provided adequate procedural due process.

The Idaho court's ruling stands for the proposition that state employees can elect to forego available procedural protections and still maintain a cause of action for a deprivation of their constitutional right to procedural due process. This ruling is irreconcilably in conflict with the Ninth Circuit's ruling in *Bignall v. North Idaho College* and *Correa v. Nampa School District No. 131.*

For these reasons, Petitioners ask this Court to grant review for the purpose of resolving the conflict which exists between the Idaho Supreme Court and the Ninth Circuit rulings. Alternatively, because the Ninth Circuit's rulings correctly interpret and apply the procedural component of the Fourteenth Amendment, Petitioners ask that the Court summarily reverse the Idaho Supreme Court with directions to resolve this case in accordance with *Bignall,* and *Correa.*

III.

The Idaho Supreme Court's ruling improperly applied this Court's prior ruling in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), when it examined whether Defendant Richardson's actions violated clearly established law.

In the Idaho Supreme Court's decision, it was concluded that Defendant Richardson was not entitled to qualified immunity for claims brought against him in his individual capacity. *See* 854 P.2d at 247-49; A10-16. Interpreting *Loudermill,* the court ruled that Richardson's actions were legally unreasonable because Arnzen was a

classified state employee, with a property interest in his continued employment, who could not be discharged without first being afforded due process of law. 854 P.2d at 249; A16. The court then concluded, " . . . Richardson's conduct violated Arnzen's property right, and Richardson's action was not that of a reasonably competent public official in Idaho in 1989," because he did not provide a hearing prior to giving Arnzen notice that the department would seek his discharge. *Id.*

As outlined in § I, *infra*, the Idaho Supreme Court's opinion improperly expanded this Court's interpretation of the Fourteenth Amendment in *Loudermill* to require notice and a hearing be afforded an employee before a decision is made to impose discipline. Courts from four circuit courts of appeal, including the Ninth, have rejected similar interpretations of the Fourteenth Amendment. *Bignall v. North Idaho College*, supra; *Jackson v. St. Joseph State Hospital*, supra; *Vance v. Chester County Board of Trustees*, supra; *Chung v. Park*, supra. Because this Court has never interpreted the Fourteenth Amendment to require a due process hearing at such an early stage of an employment controversy, the Idaho court's expansion of *Loudermill* cannot constitute "clearly established law" in 1989 when Arnzen left the employ of the Department of Law Enforcement. This fact is dispositive of the qualified immunity issue.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1981), this Court held, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Trial

courts were instructed to resolve the question of qualified immunity through motions for summary judgment by determining ". . . not only the currently applicable law, but whether the law was clearly established at the time an action occurred." *Id.* The court dealt with a defendant's duty to predict future developments in the law by writing:

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id. When resolving the immunity question through a motion for summary judgment, trial courts must objectively examine the facts encountered by the individual defendant to determine whether his actions were legally reasonable in light of the established law. *Malley v. Briggs*, 475 U.S. 335 (1986); *Anderson v. Creighton*, 483 U.S. 635 (1987).

In the present case, the trial court correctly applied these principles by recognizing the reason Arnzen did not receive a pre-termination hearing through the grievance procedures was the fact he resigned his position with the Department of Law Enforcement. In addressing Defendant Richardson's claim to qualified immunity, the trial court specifically found the appellate case law relating to allegations of coerced resignations and claims of constructive discharge under Idaho tort law was, in 1989,

unsettled. *See* 854 P.2d at 245;[7] A6-7. While it is presently unclear whether the question of "clearly established law" must be determined by referring to opinions of the United States Supreme Court, the Court of Appeals, or the local federal district court, *see Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1981), in 1989, the question of whether the notice and hearing requirements of the Fourteenth Amendment, as applied in *Loudermill*, are violated when an employee is given the option of resigning their employment or face termination had not been addressed by this Court, the Ninth Circuit Court of Appeals, or the Idaho Supreme Court.

Various circuit courts of appeal throughout the country have found that a resignation resulting from affording an employee the choice of resigning or facing dismissal proceedings is not tantamount to a discharge by coercion without procedural review. In all of these cases, the

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[7] In *Jackson v. Minidoka Irrigation District*, 98 Idaho 330, 563 P.2d 54 (1977), the court found a coerced resignation, and a constructive discharge to exist where a public employee was forced to tender her resignation under the threat of criminal prosecution for embezzlement of district funds. In comparison, in *Knee v. School District No. 139 in Canyon County*, 106 Idaho 152, 676 P.2d 727 (Ct.App. 1984), a former school superintendent claimed he had been constructively discharged when he was given the choice of resigning or face termination by the local school board. Despite the fact the school board had denied the superintendent's request that he be given time to consider the proposed resignation, the appellate court found a constructive discharge did not occur as the employee must have known he could only be terminated for cause, and he did not resist the board's request by seeking reinstatement or reconsideration. *See* 106 Idaho at 155.

appellate courts have ruled that once the employee voluntarily resigns a position, the resignation constitutes a waiver of any procedural rights which may have existed. *See Christie v. United States*, 518 F.2d 584, 207 Ct.Cl. 1933 (1975); *Dusanek v. Hannon*, 677 F.2d 538 (7th Cir.) *cert. denied sub nom. Dusanek v. O'Donnell*, 459 U.S. 1017 (1982); *Riggins v. Board of Regents of the University of Nebraska*, 790 F.2d 707 (8th Cir. 1986); *Stone v. University of Maryland Medical System*, 855 F.2d 167 (4th Cir. 1988); *Alvarado v. Picur*, 859 F.2d 488 (7th Cir. 1988); *Parker v. Board of Regents of Tulsa Junior College*, 981 F.2d 1159 (10th Cir. 1992). Given the consistent holdings from the federal appellate courts regarding the procedural due process issues involved in employee resignations, and the Idaho Court of Appeals decision in *Knee v. School District No. 139 in Canyon County, supra*, Richardson was acting reasonably when he afforded Arnzen the choice of resigning his position rather than face termination proceedings.

The trial court in this case properly applied the analytical framework established in *Harlow*, by examining the existing case law regarding the implication of the Procedural Due Process Clause in the context of cases claiming constructive discharge through coerced resignations. By doing so, the trial court correctly concluded the law was not clearly established, which afforded Defendant Richardson qualified immunity. *See* 854 P.2d at 245; A7.

The Idaho Supreme Court ignored the legal basis for the trial court's grant of qualified immunity and expanded this Court's decision in *Loudermill* to require a pre-termination hearing before an employer has made a decision to institute discipline proceedings and before the

termination actually takes effect. The Idaho court then assumed that Richardson should have known of this interpretation of the Due Process Clause despite the fact all of the relevant appellate case law from the federal and Idaho courts supported his actions. Accordingly, the decision of the Idaho Supreme Court denying Defendant Richardson qualified immunity should be summarily reversed, and the Order of the trial court reinstated.

CONCLUSION

The Petition for Writ of *Certiorari* should be granted. The Court may also wish to consider summary reversal.

Respectfully submitted,

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APPENDIX A

Joseph P. ARNZEN, Plaintiff-Appellant,

v.

STATE of Idaho, Mack W. Richardson, Director of Department Law Enforcement, and John Does I through V, Defendants-Respondents.

No. 19628.

Supreme Court of Idaho,
Boise, October 1992 Term.

May 13, 1993.

Rehearing Denied July 13, 1993.

Randall, Blake & Cox, Lewiston, for plaintiff-appellant. Scott M. Chapman argued.

Quane, Smith, Howard & Hull, Boise, for defendants-respondents. Phillip J. Collaer argued.

McDEVITT, Chief Justice.

NATURE OF THE CASE

Appellant, Joseph P. Arnzen ("Arnzen"), appeals from the summary judgment of the district court. In granting summary judgment, the district court dismissed two 42 U.S.C. § 1983 claims against respondents State of Idaho ("State") and Mack W. Richardson ("Richardson") in his official capacity as Director of the Department of Law Enforcement ("Department"). The court dismissed these claims finding that neither respondent was a "person" as that word is used in 42 U.S.C. § 1983. In addition, the court dismissed state claims (wrongful termination, breach of contract, and intentional interference with a contract) against respondents, finding that Arnzen had

failed to exhaust his administrative remedies under title 67, chapter 53, Idaho Code. After the initial summary judgment order, the court granted respondents' motion for reconsideration and dismissed the remaining 42 U.S.C. § 1983 claim against Richardson in his individual capacity. In dismissing the remaining federal claim, the court reasoned that under Idaho law it was not clear that the circumstances surrounding Arnzen's resignation from employment with the Department of Law Enforcement constituted constructive discharge. For the reasons stated below, we affirm in part and reverse in part, the decision of the district court.

BACKGROUND AND PRIOR PROCEEDINGS

On October 10, 1990, Arnzen filed a complaint and demand for jury trial against the State and Richardson, both individually and in his official capacity as Director of the Department. In the complaint, Arnzen alleged that he had been employed by the Department, and that he was provided with an employment handbook which dictated the obligations of the employer and employee and provided for a grievance procedure. On October 18, 1989, during Arnzen's employment with the Department, he alleged that he was charged with violating I.C. § 36-1101(e) (1976), relating to attempting to kill a deer with the aid of an artificial light. When Arnzen asked his supervisor, Captain Ron Moore ("Moore"), what the Department would do to him, he alleged that Moore responded, "[n]othing. You might have to take your lumps in court." Arnzen then alleged that in reliance on Moore's statement, he pled guilty to the charge, was fined $127.50, and had his hunting license suspended for one

(1) year. On October 20, 1989, Arnzen alleged that he was placed on administrative leave with pay pending an investigation, and that Moore told him that he did not have anything to worry about. On October 26, 1989, investigators came to Arnzen's home and took a written statement from him. On November 3, 1989, Moore came to Arnzen's home and informed him that the Boise office had decided that Arnzen would be fired if he did not resign.

Arnzen listed three counts in the complaint: (1) the acts of respondents denied him of his constitutional rights, U.S. Const. amend. V and XIV, and violated 42 U.S.C. § 1983[1]; (2) the acts of respondents violated the employment contract; and (3) he was discharged without due process of law because he was not afforded a pre-termination hearing. Arnzen prayed for damages for violation of his civil rights, wrongful discharge, and failure to give notice and an opportunity to be heard.

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[1] This federal statute reads in full:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

On November 27, 1990, respondents filed a motion for summary judgment. Along with the motion, respondents filed three (3) supporting affidavits, in which the following was asserted:

1. ***Affidavit of Ron Moore:*** Moore was Arnzen's supervisor. On November 3, 1989, he was told by the "Boise office" to tell Arnzen that he could either resign or be discharged. In this regard, "[a]ffiant then advised Mr. Arnzen that if he refused to resign, he would be fired." On June 4, 1990, Moore received a grievance from Arnzen, but that grievance was denied because it was untimely. Since receiving the June 4, 1990 grievance, Moore has not received any further notice of appeal or other documentation from Arnzen.

2. ***Affidavit of Kris Michalk:*** Kris Michalk ("Michalk") is a claims technician for the Bureau of Risk Management. On February 7, 1990, he reviewed a claim for damages filed by Arnzen's attorney. After review, Michalk informed the attorney that it appeared that the claim could not be honored due to failure to comply with administrative remedies. On March 5, 1990, he received a letter from Arnzen's attorney requesting copies of the grievance procedure of the Department. On March 26, 1990, he provided Arnzen's attorney with the requested copies.

3. ***Affidavit of Mack W. Richardson:*** In October of 1989, Richardson was made aware of the charge against Arnzen and his subsequent conviction. On October 20, 1989, Arnzen was put on administrative leave with pay pending an investigation. On November 2, 1989, after the

investigation, it was recommended that Arnzen be terminated but given the opportunity to resign. On November 3, 1989, Richardson signed a letter of termination addressed for Arnzen. However, Richardson was advised that Arnzen chose to resign. On June 4, 1990, Richardson was advised that Arnzen had filed a grievance and that the grievance was denied as untimely. Richardson has not received any subsequent notice of appeal or other documentation from Arnzen.

On December 20, 1990, Arnzen filed an amended complaint and demand for jury trial. In it, he added a cause of action regarding tortious breach or interference with a contract.

Along with the complaint, Arnzen filed an affidvit. In his affidavit, Arnzen stated that he was unwillingly forced to resign. In addition, he stated that the grievance procedure does not provide for the filing of a grievance by a discharged person since a discharged person no longer has a "supervisor." Further, Arnzen alleged that Moore told him that filing a grievance would be a futile act, and that "you know they are never giving you your job back." Finally, Arnzen alleged that because he did not have a supervisor and because of the statements by Moore, he did not file a grievance until he talked with an attorney.

On January 4, 1991, respondents filed an answer. Among other things, they asserted: (1) immunity from liability because they are not "persons" for purposes of 42 U.S.C. § 1983; (2) immunity from liability by virtue of title 6, chapter 9, Idaho Code; (3) no deprivation of Arnzen's constitutional rights; and (4) Arnzen's claim is

barred by the Eleventh Amendment to the Constitution of the United States.

On July 25, 1991, the district court heard oral argument on respondents' motion for summary judgment. The court partially granted the motion, dismissing the causes of action against the State and Richardson in his official capacity. In doing so, the court found neither respondent to be a "person" under 42 U.S.C. § 1983. In addition, the court dismissed the state claims against respondents because it found that Arnzen had not exhausted his administrative remedies.

On August 12, 1991, respondents moved for reconsideration pursuant to I.R.C.P. 11(a)(2)(B). The motion pertained to the court's decision not to dismiss the federal claim against Richardson in his individual capacity.

On the same day, respondents filed the affidavit of R. Monte MacConnell in support of the motion for reconsideration. In his affidavit, Mr. MacConnell stated that he was Chief Counsel to the Director of the Department. In this capacity, he was consulted regarding the proper procedure for disciplinary action against Arnzen. He advised that Arnzen be placed on administrative leave with pay pending an investigation. Subsequently, he advised that state law would permit termination and he recommended that this be done. He then reviewed the termination letter and advised that Arnzen be given the option to resign.

The district court heard argument on the motion for reconsideration on August 29, 1991. On September 4, 1991, the court issued its opinion and order on the motion for reconsideration. The court stated the issue as "whether defendant, Mack W. Richardson, in his personal

capacity is entitled to qualified immunity from liability under 42 U.S.C. § 1983." The court, citing *Wheaton v. Webb-Petett*, 931 F.2d 613, 619 (9th Cir. 1991), reasoned that in order to determine whether qualified immunity shields Richardson from liability, it must ask "whether, in light of preexisting law, the unlawfulness of the official's actions must have been reasonably apparent to him or her." The court concluded that "it would not have been reasonably apparent" to Mr. Richardson that his actions were clearly in violation of the law. Furthermore, the court stated that "Idaho law is unclear as to whether or not requesting a public employee's resignation can constitute constructive discharge of that employee under certain circumstances." In this regard, the court compared *Jackson v. Minidoka Irrig. Dist.*, 98 Idaho 330, 563 P.2d 54 (1977), with *Knee v. Sch. Dist. No. 139, in Canyon County*, 106 Idaho 152, 676 P.2d 727 (Ct.App.1984), *review denied*, and concluded that:

> Although it is decisively clear under Idaho law that a public employee has a vested property interest in continued employment, thus requiring that he or she be afforded notice and some sort of hearing before termination of employment, it is unclear on the facts of this case that the circumstances surrounding Mr. Arnzen's resignation constituted constructive discharge triggering these requisite due process protections. *Perry v. Sindermann*, 408 U.S. 593, 599[, 92 S.Ct. 2694, 2698, 33 L.Ed.2d 570] (1972); *Harkness v. City of Burley*, 110 Idaho 353[, 715 P.2d 1283] (1986).

Thus, the court granted respondent's motion for reconsideration and dismissed the cause of action against Richardson in his individual capacity. An order and judgment was issued on September 13, 1991, fully granting respondents' motion for summary judgment and awarding respondents $110.55 in costs.

On October 23, 1991, Arnzen filed a notice of appeal pursuant to I.A.R. 11(a)(1). He appealed from the August 6, 1991 order, the September 4, 1991 opinion and order, and the September 12, 1991 order.

ISSUES ON APPEAL

In order to resolve this appeal, we must address the following issues:

I. Was the district court correct in ruling that the State and Richardson, in his official capacity as Director of the Department, were not "persons" as that word is used in 42 U.S.C. § 1983?

II. Was the district court correct in ruling that Richardson, in his individual capacity, was entitled to qualified immunity?

III. Was the district court correct in dismissing the State claims because Arnzen failed to exhaust administrative remedies?

ANALYSIS

I.

WAS THE DISTRICT COURT CORRECT IN RULING THAT THE STATE AND RICHARDSON, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DEPARTMENT, WERE NOT "PERSONS" AS THAT WORD IS USED IN 42 U.S.C. § 1983?

The United States Supreme Court has recently addressed "the question whether a State, or an official of the State while acting in his or her official capacity, is a 'person' within the meaning of 42 U.S.C. § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 60, 109 S.Ct. 2304, 2305, 105 L.Ed.2d 45 (1989). The court held "that neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will*, 491 U.S. at 71, 109 S.Ct. at 2312. It explained that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. . . . As such, it is no different from a suit against the State itself." *Will*, 491 U.S. at 71, 109 S.Ct. at 2311 (citations omitted). In reaching its decision, the Court recognized that § 1983:

> [P]rovides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum to litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suit unless the State has waived its immunity, . . . or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity.

Will, 491 U.S. at 66, 109 S.Ct. at 2309 (citations omitted).

It is clear "[t]hat Congress, in passing § 1983, had no intention to disturb the States' Eleventh Amendment immunity. . . . " *Will*, 491 U.S. at 66, 109 S.Ct. at 2309, citing *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). We have interpreted *Quern* to "hold not only that § 1983 does not abrogate the states [sic] eleventh amendment immunity, but also as holding that states are not 'persons' for purposes of § 1983." *Merritt v. State*, 108 Idaho 20, 26, 696 P.2d 871, 877 (1985).

Thus, it is clear that, in Idaho, the State, for purposes of 42 U.S.C. § 1983, is not a "person." Additionally, it is clear that a suit against a state official acting in his or her official capacity, is nothing more than a suit against the state, and, thus, the state official in his or her official capacity is not, for purposes of 42 U.S.C. § 1983, a "person."

II.

WAS THE DISTRICT COURT CORRECT IN RULING THAT RICHARDSON, IN HIS INDIVIDUAL CAPACITY, WAS ENTITLED TO QUALIFIED IMMUNITY?

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), the United States Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Later, in *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987), the United States Supreme Court explained that "[t]he contours of the right

must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." More recently, in *Hunter v. Bryant*, ___ U.S. ___, ___, 112 S.Ct. 534, 537, 116 L.Ed.2d 589 (1991), the United States Supreme Court further explained the qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," quoting *Malley v. Briggs*, 475 U.S. 335, 343, 106 S.Ct. 1092, 1097, 89 L.Ed.2d 271 (1986), by "accomodat[ing] for reasonable error." Thus, in order to determine whether Richardson, in his individual capacity, was entitled to qualified immunity, we must ask:

1. Was there a clearly established law;
2. Did Richardson's conduct violate a clearly established right of Arnzen's; and
3. Was Richardson's conduct reasonable?

A. ***Was There A Clearly Established Law?***

It is abundantly clear that at the time this action arose, public employees in Idaho who had a property interest in continued employment could not be deprived of this property interest without due process of law. *Harkness v. City of Burley*, 110 Idaho 353, 715 P.2d 1283 (1986); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985). It was equally well-established that due process requires, at a minimum, notice of the contemplated action and notice of the basis and evidence relied upon for the contemplated action, and an opportunity to respond. *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495. The first component of the due process requirement, notice, may be an oral or written notification of the charges against the employee and the

basis and evidence supporting those charges. *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495. The second component of the due process requirement, opportunity to respond, is an opportunity for the employee, either in person or in writing, to present his or her reasons "why *proposed* action should not be taken. . . . " *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495 (emphasis added). Of course, as our emphasis indicates, the opportunity to respond must take place before the administrative action occurs. More specifically, Arnzen must have been given an opportunity to respond to the charges against him before the State made the decision to terminate him from employment with the Department.

B. ***Did Richardson's Conduct Violate A Clearly Established Right Of Arnzen's?***

This prong of the qualified immunity analysis is a compound question: (1) did Arnzen have a clearly established right; and (2) did Richardson's conduct violate it?

As to the first question, in order for Arnzen to have a property interest in continued employment with the Department, he must have been more than an employee at will. *Harkness*, 110 Idaho at 356, 715 P.2d at 1286. "[A]n employee 'hired pursuant to a contract which specifies the duration of the employment, *or* limits the reasons for which the employee may be discharged' is not an employee 'at will.' " *Harkness*, 110 Idaho at 356, 715 P.2d at 1286, quoting *MacNeil v. Minidoka Memorial Hosp.*, 108 Idaho 588, 589, 701 P.2d 208, 209 (1985) (emphasis in original). In *Tiffany v. City of Payette*, 121 Idaho 396, 825 P.2d at 493 (1992), we held that an employee did have a

property interest in continued employment with the City of Payette where she was a "permanent" employee according to the terms of an employee policy manual and was, thus, entitled to the procedural protections of the manual. In this case, the parties do not dispute Arnzen's status as a "classified" employee of the State with "permanent" status. Thus, Arnzen was entitled to the procedural protections of the policy and procedure manual, as well as, at least, the minimum due process protections.

As to the second question we must look to the facts to determine if Richardson's conduct violated Arnzen's right to due process. According to his affidavit, Richardson signed a letter of termination addressed to Arnzen on November 3, 1989.[2] So, the decision to terminate

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2. The letter of termination read:

> November 3, 1989
> Cpl. Joseph P. Arnzen
> HCL 1
> Box 34
> Nezperce, [sic] Idaho 83543
> Deal Cpl. Arnzen:
> I have reviewed the Investigative Report conducted as a result of your arrest by an officer of the Idaho Fish and Game Department for attempting too [sic] kill a deer with the aid of an artificial light and your subsequent convictions for a violation of Idaho Code 36-1101(e).
> I considered this action on your part as being detrimental to good order and discipline within the Department and in accordance with Idaho Personnel Commission Rule 19.A.1.e. I am terminating your employment as a Corporal with the Idaho State Police

Arnzen occurred on November 3, 1989. Prior to this decision, there was no notice or opportunity to be heard by Arnzen.[3] In other words, Richardson's conduct (his decision to terminate Arnzen) violated Arnzen's right to minimal due process protections.

3. ***Was Richardson's conduct reasonable?***

The third prong of the qualified immunity analysis requires this Court to ask whether a reasonably competent public official in Idaho in 1989 would have known that a public employee who possessed a property interest in their continued employment had the right to notice

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effective 5:00 P.M. November 6, 1989. Your accumulated vacation time of 139.72 hours will be paid to you in a lump sum.
Sincerely,
/s/
Mack W. Richardson, Jr.
Director
Department of Law Enforcement
c: Richard Hutchinson, IPC
Col Rich Humpherys [sic], ISP
Capt Ron Moore, ISP
John Butler, DLE
Monte McConnell, DLE

[3] We note that Arnzen was placed on administrative leave with pay pending an investigation prior to Richardson's decision to terminate him. In fact, Arnzen received written notification that the suspension was "pending an investigation of your recent alleged Fish and Game criminal violations." Although the record reveals that the investigators took a written statement from Arnzen, it does not reveal *what* his supervisor's concerns or complaints were, or the *extent* to which Arnzen had an opportunity to respond.

and a hearing before termination from employment. *Hunter*, ___ U.S. at ___, 112 S.Ct. at 537; *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738. Therefore, in the present case, if the law was clearly established that Arnzen, as a "classified" employee of the State with "permanent" status, was entitled to due process guarantees, then Richardson's "immunity defense ordinarily should fail since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 819, 102 S.Ct. at 2738.

Recently, this Court reiterated that a public employee who is hired pursuant to contract which specifies the duration of employment or limits the reasons for termination has a property interest in continued employment. *Tiffany*, 121 Idaho at 404, 825 P.2d at 501. In 1986, we held that a public employee who has a property interest in continued employment cannot be terminated before being given due process. *Harkness*, 110 Idaho at 356, 715 P.2d at 1286. Additionally, we held:

> [A] permanent employee, whose employment is not terminable at the will of either the employee or the employer, holds a property interest in his or her position. *Allen v. Lewis-Clark State College*, 105 Idaho 447, 460 n. 6, 670 P.2d 854, 867 n. 6 (1983) ("A term of employment set by contract is a property interest safeguarded by due process."); *Bowler v. Board of Trustees*, 101 Idaho 537, 541, 617 P.2d 841, 845 (1980) (Teacher's interest in renewable contract rights to continued employment was a property interest); *Ferguson v. Board of Trustees*, 98 Idaho 359, 364, 564 P.2d 971, 976 (1977), *cert. denied*, 434 U.S. 939, 98 S.Ct. 431 [54 L.Ed.2d 299] (1977) (Teacher's right to automatic annual renewal of contract and right

> not to be discharged except for cause gave property interest in employment.).
>
> As Chief Justice Donaldson wrote for a unanimous Court, an employee "hired pursuant to a contract which specifies the duration of the employment, *or* limits the reasons for which the employee may be discharged" is not an employee "at will." *MacNeil v. Minidoka Memorial Hospital*, 108 Idaho 588, 589, 701 P.2d 208, 209 (1985) (emphasis added).

Harkness, 110 Idaho at 356, 715 P.2d at 1286 (footnote omitted). We hold that the law was clearly established in 1989 that Arnzen, as a "classified" and "permanent" employee of the State had a property interest in continued employment. Therefore, Richardson, in terminating Arnzen without due process, did not act as a reasonably competent public official in Idaho in 1989.

We further hold that Richardson, in his individual capacity, was not entitled to qualified immunity; the law was clearly established that Arnzen had a property right to due process guarantees before he was terminated, Richardson's conduct violated Arnzen's property right, and Richardson's action was not that of a reasonably competent public official in Idaho in 1989.

III.

WAS THE DISTRICT COURT CORRECT IN DISMISSING THE STATE CLAIMS BECAUSE ARNZEN FAILED TO EXHAUST ADMINISTRATIVE REMEDIES?

In *Bohemian Breweries v. Koehler*, 80 Idaho 438, 332 P.2d 875 (1958), this Court set forth the rule of exhaustion of administrative remedies as follows:

> While as a general rule administrative remedies should be exhausted before resort is had to the courts to challenge the validity of administrative acts, such rule is not absolute and will be departed from where the interest of justice so require, and the rule does not apply unless the administrative agency acts within its authority.

Bohemian Breweries, 80 Idaho at 446, 332 P.2d at 879. This Court has consistently followed this rule. In *Grever v. Idaho Tel. Co.*, 94 Idaho 900, 499 P.2d 1256 (1972), we set forth the rule as follows:

> [T]he doctrine of exhaustion of administrative remedies generally requires that the case run the full gamut of administrative proceedings before an application for judicial relief may be considered.
>
> * * *
>
> In relaxing the doctrine of exhaustion this Court held that the rule will be departed from under certain circumstances, first, where the interest of justice so require and secondly, where the agency acts outside its authority.

Grever, 94 Idaho at 903, 499 P.2d at 1259, citing *Bohemian Breweries*, 80 Idaho at 446, 332 P.2d at 879 (footnotes omitted). More recently, we have recognized the exhaustion rule as set forth in *Grever* and *Bohemian Breweries in Fairway Dev. Co. v. Bannock County*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990).

The policies and procedures of the Department set forth a four-step grievance process. The first step, which is optional, is a discussion with the grievant's "immediate supervisor." *Idaho Dep't of law Enforcement, Policy and*

Procedure, DLE 89-304 p. 2 (Effective 10/01/89). The second step requires the grievant to file a written grievance with his or her "immediate supervisor," or, if that person is not available, his or her "next-level supervisor." DLE 89-304, pp. 2-3. After receiving a "suggested solution" from the "second-level supervisor," the third step requires the grievant to file a "Request for Impartial Review" with his or her "second-level supervisor." DLE 89-304, pp. 3-5. After an impartial review panel hears the grievance, it submits its decision to the grievant and the Director. The Director then informs the grievant of the "Department's decision." DLE 89-304, p. 5. Finally, the grievant is then allowed to file an appeal under I.C. § 67-5316. DLE 89-304, p. 5.

Arnzen argues that since he was fired, he did not have a "supervisor," and, therefore, could not comply with the grievance process. This argument is flawed for two reasons. First, the record discloses that Arnzen did file a grievance with Moore, his supervisor, on June 4, 1990. The record further reveals that Arnzen's grievance was processed by the Department and ultimately denied as being untimely.[4] Second, if we were to accept Arnzen's argument, every employee who is dismissed from employment with the Department would be without administrative recourse.

---

[4] The grievance procedure requires the grievant to file his or her grievance within five (5) days "from the time you are notified or become aware of a grievable-matter." DLE 89-304, p. 2.

Arnzen also argues that the rule of exhaustion should be relaxed because Moore had told him that the Department would never give him his job back. Essentially, Arnzen is making a futility argument. The grievance procedure sets forth four steps. The first two steps involve the grievant's supervisor. The third step involves an impartial review panel, consisting of reviewers chosen by the grievant and the Department who are not employed by the grievant's particular agency. DLE 89-304, p. 4. Arnzen sets forth no reasons why he would not be afforded a meaningful review by this panel. Our examination of the record likewise reveals no reasons why an administrative appeal to the impartial review panel would be futile for Arnzen.

Because Arnzen had failed to show that justice requires relaxation of the exhaustion rule or that the Department acted outside its authority, the general rule of exhaustion of administrative remedies applies. Therefore, the district court correctly dismissed his state claims for failure to exhaust his administrative remedies.

CONCLUSION

We affirm that portion of the district court's opinion and judgment dismissing Arnzen's 42 U.S.C. § 1983 claims against the State and Richardson, in his official capacity, and dismissing Arnzen's state law claims. We reverse that portion of the district court's opinion and judgment dismissing Arnzen's 42 U.S.C. § 1983 claim against Richardson in his individual capacity.

No costs on appeal.

JOHNSON and *BISTLINE, JJ.*, and *BAIL, J.* Pro Tem., concur.

BAKES, Justice Pro Tem., concurring.

I concur in the Court's opinion, and write only to note that a more fully developed record might disclose that no *Loudermill* due process violation occurred in this case. As footnote 3, ante p. 248 points out, Arnzen was given written notification that his employment was suspended because of his fish and game violation, and he was given the opportunity to, and did give a written statement, the contents of which may have satisfied his due process right "to respond." However, the record is not sufficiently developed to support the trial court's summary judgment in this case.

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOSEPH P. ARNZEN, Plaintiff, v. THE STATE OF IDAHO, MACK W. RICHARDSON, Director of the Department of Law Enforcement, and DOES I. through V., Defendants.	)	Case No. 6476 ORDER (Filed Aug 6, 1991)

Defendants filed a motion for summary judgment. Oral argument was presented to this Court on the date of July 25, 1991, by Scott Chapman, attorney for the Plaintiff herein, and Phillip J. Collaer, attorney for the Defendants. Following argument, the Court announced its decision in open court based upon the reasons set forth in its decision and on the record before it.

IT IS HEREBY ORDERED that the federal claim against the State of Idaho based on violation of the plaintiff's constitutional rights under the Fifth and Fourteenth Amendments under 42 U.S.C. 1983 is dismissed because the state is not a "person" as defined in the aforementioned statute.

IT IS FURTHER ORDERED that the federal claim against Mack W. Richardson, in his official capacity, based on violation of the plaintiff's constitutional rights under the Fifth and Fourteenth Amendments under 42

U.S.C. 1983 is dismissed because the defendant is not a "person" as defined in that statute.

IT IS FURTHER ORDERED that the federal claim against Mack W. Richardson, in his personal capacity, based on violation of the plaintiff's constitutional rights under the Fifth and Fourteenth Amendments under 42 U.S.C. 1983 is not dismissed because the defendant is a "person" in his personal capacity under that statute.

IT IS FURTHER ORDERED that the state claims against the State of Idaho and Mack W. Richardson alleging violation of state law based on wrongful termination, breach of contract, and intentional interference with contract are dismissed because the plaintiff failed to exhaust the administrative remedies afforded him under the Personnel Commission Act, Idaho Code, Title 67, Chapter 53.

DATED this 26 day of July, 1991.

/s/ Ron Schilling

CERTIFICATE OF MAILING

I hereby certify that a
true copy of the foregoing
Order was mailed, postage
prepaid, by the undersigned
at ~~Lewiston~~, Idaho, this
NezPerce
26 day of July, 1991, on:

Scott Chapman of Rapaich,
Knutson, and Chapman
Post Office Box 1388
Lewiston, ID 83501

Phillip J. Collaer, Quane,
Smith, Howard and Hull
101 S. Capitol Boulevard
Suite 1600
Boise, ID 83701

/s/ Cathy Larson, Clerk

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LEWIS

JOSEPH P. ARNZEN, Plaintiff, v. THE STATE OF IDAHO, MACK W. RICHARDSON, Director of the Department of Law Enforcement, and DOES I through V, Defendants.	CASE NO. 6476 OPINION AND ORDER (Filed September 4, 1991)

Defendants filed a motion for reconsideration of this Court's order partially granting Defendant's Motion for Summary Judgment. At the July 25, 1991, hearing on defendants' Motion for Summary Judgment, this Court decided that the plaintiff had established a cause of action under 42 U.C.S. [sic] 1983 against Mack Richardson in his individual capacity, based upon the manner in which plaintiff resigned his employment from the Department of Law Enforcement. Oral argument on the Motion for Reconsideration was presented to this Court on August 29, 1991, by Scott Chapman, attorney for the plaintiff herein, and Philip J. Collaer, attorney for the defendants.

The narrow issue presented in this motion addresses the question of whether defendant, Mack W. Richardson, in his personal capacity is entitled to qualified immunity from liability under 42 U.S.C. 1983. Qualified immunity shields public employees who perform discretionary functions from civil liability when "their conduct does

not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 808 (1982). *See also Wheaton v. Webb-Petett,* 931 F.2d 613 (9th Cir. 1991); *Romero v. Kitsap County,* 931 F.2d 624 (9th Cir. 1991). Such immunity is generally available to public officials, depending on the scope of their discretion, responsibilities, and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. *Scheuer v. Rhodes,* 416 U.S. 232, 40 L.Ed.2d 90, 103 (1974).

In analyzing the existence or non-existence of qualified immunity in any given case, the inquiry is a particularized one: whether, in light of pre-existing law, the unlawfulness of the official's actions must have been reasonably apparent to him or her. *Wheaton v. Webb-Petett, supra,* at 619. Having reviewed the constitutional and statutory law as it existed at the time of plaintiff's requested resignation, this Court must conclude that it would not have been reasonably apparent to an official in Mr. Richardson's position that giving plaintiff the option of immediately resigning or being discharged soon thereafter was clearly in violation of the plaintiff's constitutional rights.

Upon reconsideration, it was brought to this Court's attention that Idaho law is unclear as to whether or not requesting a public employee's resignation can constitute constructive discharge of that employee under certain circumstances. In an earlier Idaho decision, *Jackson v. Minidoka Irrigation District,* 98 Idaho 330 (Ct.App. 1977), a public employee at will tendered her resignation in the face of a threat of criminal prosecution for embezzlement

of district funds. The Court held that the employee's resignation was involuntary, thus constituting constructive discharge as of the date of her resignation:

> The fact of discharge, however, does not depend upon the use of formal words of firing. The test is whether sufficient words or actions by the employer would logically lead a prudent man to believe his tenure had been terminated. . . . There could have been little doubt in Appellant's mind that she was in effect being fired when she signed her resignation and the fact that the resignation was later found to have been coerced does not alter the character of her termination. *Jackson v. Minidoka Irrigation Dist, supra,* at 334-335.

By comparison, a more recent Idaho Court of Appeals decision, *Knee v. School District No. 139 in Canyon County,* 106 Idaho 152 (Ct.App. 1984), found there to be no constructive discharge based on the facts as presented it. In that case, the school superintendent's resignation was immediately requested by the school board at the annual board meeting convened in order to review his work performance. The Court held this resignation to be completely voluntary because: (1) the employee must have known that he could only be terminated for good cause; (2) no warning had been given the superintendent; and (3) he did not resist the board's request, nor did he seek reinstatement or reconsideration of the board's decision. *Knee v. School District No. 139 in Canyon County, supra,* at 155.

Although it is decisively clear under Idaho law that a public employee has a vested property interest in continued employment, thus requiring that he or she be

afforded notice and some sort of hearing before termination of employment, it is unclear on the facts of this case that the circumstances surrounding Mr. Arnzen's resignation constituted constructive discharge triggering these requisite due process protections. *Perry v. Sindermann,* 408 U.S. 593, 599 (1972); *Harkness v. City of Burley,* 110 Idaho 353 (1986).

ORDER

It is hereby ordered that the defendants' Motion for Reconsideration be granted, and that the cause of action against Mack W. Richardson in his personal capacity under 42 U.S.C. 1983 be dismissed.

DATED this 4th day of September, 1991.

/s/ Ron Schilling
Ron Schilling – District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER was mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 4th day of September, 1991, on:

Scott Chapman
P.O. Box 1388
Lewiston, ID 83501

Phillip Collaer
P.O. Box 519
Boise, ID 83701-0519

BETTY J. WILSEY, CLERK

By: Illegible
Deputy

In The Supreme Court of the State of Idaho

JOSEPH P. ARNZEN, Plaintiff-Appellant, v. THE STATE OF IDAHO, MACK W. RICHARDSON, Director of the Department of Law Enforcement, and DOES I through V, Defendants-Respondents.	)	ORDER DENYING PETITION FOR REHEARING AND APPLICATION TO APPEAR AS AMICUS CURIAE No. 19628 Reh. No. 93Rh-22

The Respondent Mack W. Richardson having filed a PETITION FOR REHEARING on June 2, 1993, and supporting MEMORANDUM on June 15, 1993, of the Court's Opinion released May 13, 1993. An APPLICATION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN PETITION FOR REHEARING was filed by the Idaho Personnel Commission June 2, 1993, and an Amicus Curiae brief lodged that date. The Court is fully advised; therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent Mack W. Richardson's PETITION FOR REHEARING be, and hereby is, DENIED.

IT FURTHER IS ORDERED that the APPLICATION FOR LEAVE TO APPEAR AS AMICUS CURIAE IN PETITION FOR REHEARING be, and hereby is, DENIED and the Amicus brief which was previously lodged shall not be filed.

DATED this 13th day of July, 1993.

By Order of the Supreme Court

/s/ Frederick C. Lyon
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Ronald Schilling

67-5315. Establishment and adoption of employee grievance procedure. – (1) Each participating department shall, on or before January 1, 1988, establish and adopt an employee grievance procedure within such department, which shall be reduced to writing and shall be in full compliance with the provisions of the uniform grievance procedure as adopted by rule by the Idaho personnel commission pursuant to subsection (4) of this section. The department grievance procedure shall be approved by the Idaho personnel commission prior to implementation. A copy of the approved grievance procedure plan shall be furnished and explained to each employee of the department concerned. No employee shall be disciplined or other prejudiced in his employment for exercising his rights under the plan, and department heads shall encourage the use of the plan in the resolution of grievances arising in the course of public employment. A classified employee may grieve any matter, except that compensation shall not be deemed a proper subject for consideration under the grievance procedure except as it applies to alleged inequities within a particular agency or department, and except for termination during the entrance probationary period.

(2) No action of a participating department relating to a disciplinary dismissal, suspension or demotion, or an involuntary transfer shall be effective until the affected employee shall have had the opportunity to complete the grievance procedure adopted pursuant to subsection (1) hereof, unless such employee shall have waived the right to proceed thereunder in writing; provided, however, upon application to the director of commission by the

department and a showing that the matter is of an emergency nature, the director of the commission may approve the immediate implementation of the department action. However, such approval shall not deprive the employee of the right to proceed pursuant to the grievance procedure nor of the right to seek other remedies pursuant to the provisions of chapter 53, title 67, Idaho Code.

The term "emergency" as used in this section shall mean a sudden unforeseen set of facts requiring immediate action to avoid irreparable harm to the role or mission of the participating department. Before invoking the emergency procedure provided for herein, the department shall give written notice to the employee of its intent to invoke such procedure and of the facts constituting such emergency, and shall furnish proof of such notice to the state personnel director.

(3) If the grievance concerns a matter which is reviewable pursuant to section 67-5316, Idaho Code, the time for appeal to the commission shall not commence to run until the employee has completed the grievance procedure provided by the department in accordance with the terms thereof; provided, however, the failure of an employee to pursue the grievance procedures established within the department shall constitute a waiver of the employee's right of review by the commission.

(4) On or before July 1, 1987, the Idaho personnel commission shall adopt a rule defining a uniform grievance procedure for use by all participating departments. The rule shall provide a complete procedure for all stages of the grievance process. Among other provisions, the

procedure shall contain the following minimum requirements:

(a) procedure requiring prompt resolution of the grievance and establishing time periods for each step of the procedure,

(b) provision for impartial review of the grievance which may include review by persons not connected with the particular department,

(c) procedure guaranteeing the employee the right to be represented by a person of the employee's own choosing at each step of the procedure, except the initial informal discussion with the immediate supervisor. [I.C., § 67-5309A, as added by 1973, ch. 165, § 1, p. 316; am. 1975, ch. 164, § 5, p. 434; am. 1983, ch. 210, § 1, p. 583; redesig, and am. 1986, ch. 134, § 3, p. 355; am 1987, ch. 100, § 1, p. 198.]

Compiler's notes. This section was formerly compiled as § 67-5309A.

Former § 67-5315, which comprised 1965, ch. 289, § 15, p. 746; am. 1974, ch. 34, § 5, p. 988, was repealed by S.L. 1986, ch. 134, § 2.

Section 1 of S.L. 1986, ch. 134 is compiled as § 67-5304 and § 2 contains a repeal.

Section 2 of S.L. 1983, ch. 210 is compiled as § 67-5309C.

Section 2 of S.L. 1987, ch. 100 declared an emergency. Approved March 25, 1987.

Cited in: Stroud v. Department of Labor & Indus. Servs., 112 Idaho 891, 736 P.2d 1345 (Ct. App. 1987); Department of Health & Welfare v. Sandoval, 113 Idaho 186, 742 P.2d 993 (Ct. App. 1987).

67-5316. Appeal procedure. – (1) Appeals shall be limited to the following:

(a) Any classified employee who has successfully completed the entrance probationary period may, after completing the departmental grievance procedure, appeal a disciplinary dismissal, demotion or suspension, or classification.

(b) Any classified employee may, after completing the departmental grievance procedure, appeal the failure of an appointing authority to provide a right and/or benefit to which the employee is entitled by law.

(c) Any interested person may appeal any decision or action taken by the state personnel director or staff of the Idaho personnel commission in the performance of their official duties.

(d) Any interested person may appeal any other matters as may now or later be assigned to the commission by law.

(2) The decision or action of the appointing authority shall be final and conclusive unless a classified employee files an appeal within thirty-five (35) days after completing the departmental grievance procedure concerning the actions referred to in subsection (1)(a), (b), (c) and (d) of this section. A decision of the personnel commission director or staff shall be final and conclusive as to any other interested person unless an appeal is filed within thirty-five (35) days of written notice of that decision.

(3) The commission shall assign the matter for hearing to a duly appointed hearing officer, who may be a member of the commission.

(4) Where the action in dispute was the discharge, demotion, or suspension, upon determination that proper cause did not in fact exist within the definitions set forth in section 67-5309(n) [67-5309(m)] Idaho Code, or that the action was taken by reason of illegal discrimination, the commission or the hearing officer shall order the reinstatement of the employee in the same position or a position of like status and pay, with or without loss of pay for the period of discharge, demotion, or suspension, or may order such other remedy as may be determined to be appropriate. In all other disputed matters, the commission and the hearing officer may order such action as may be appropriate.

(5) Process and procedure under this act shall be as summary and simple as reasonably may be. The hearing officer appointed by the commission shall have the power to subpoena witnesses, administer oaths, and examine such of the books and records of the parties to a proceeding as relate to the questions in dispute. A verbatim record of the proceedings at hearings before the commission or a hearing officer shall be maintained either by electrical devices or by stenographic means, as the commission or hearing officer may direct, but if any party to the action requests a stenographic record of the proceedings, the record shall be done stenographically. The requesting party shall pay the costs of transcribing the proceedings.

The district court, in and for the county in which any proceedings before the Idaho personnel commission are held, shall have the power to enforce by proper proceedings the attendance and testimony of witnesses, and production and examination of books, papers, and records.

(6) If the parties reach an agreement in regard to the matters of dispute, a memorandum of the agreement shall be filed with the commission and, if approved by it, the memorandum shall be enforceable for all purposes.

(7) The hearing officer shall give written notice of the time and place of hearing, either by personal service or by mail. Service by mail shall be deemed complete when a copy of such notice is deposited in the United States post office, with postage prepaid, addressed to a party's last known address, as shown in the records and files of the commission. An affidavit of personal service shall be filed by the person making the same.

(8) The hearing officer to whom the matter has been assigned shall make such inquiry and investigations as shall be deemed necessary. The hearings shall be held in such place as the hearing officer may designate. The decision of the hearing officer consisting of such findings of fact conclusions of law and orders as are necessary, together with the record of the proceedings, shall be filed in the office of the Idaho personnel commission. A copy of the hearing officer's decision shall be immediately sent to the parties by United States mail. The decision of the hearing officer shall be final and conclusive between the parties, unless a petition for review is filed with the commission within thirty-five (35) days. The petition for

review shall specifically cite the alleged errors of fact or law made by the hearing officer.

(9) Any party in interest may file in the district court for the county in which any party to the proceedings resides, a certified copy of the final decision of the hearing officer, which the district court shall have the power to enforce by proper proceedings.

(10) Where the decision and order of the hearing officer directed the reinstatement of an employee, the employee shall be reinstated upon receipt of a copy of the decision unless a petition for review is filed. [I.C., § 67-5316, as added by 1969, ch. 171, § 3, p. 510; am. 1977, ch. 307, § 5, p. 856; am. 1979, ch. 192, § 2, p. 554; am. 1986, ch. 134, § 4, p. 355.]

Compiler's notes. The bracketed reference "67-5309(m)" in subsection (4) was inserted by the compiler.

The words "this act" refer to S.L. 1969, ch. 171, compiled herein as §§ 67-5303, 67-5309, 67-5316.

Section 2 of S.L. 1969, ch. 171 is compiled herein as § 67-5309.

Sections 4 and 6 of S.L. 1977, ch. 307 are compiled as §§ 67-5314 and 67-5326, respectively.

Section 1 of S.L. 1979, ch. 192 is compiled as § 67-5309C.

Section 4 of S.L. 1969, ch. 171 declared an emergency. Approved March 18, 1969.

Sec. to sec. ref. This section is referred to in §§ 67-5309A and 67-5309B.

Cited in: Ashley v. Department of Health

SECTION 20
GRIEVANCES AND APPEALS

20.A. Departmental Grievance Procedures

20.A.1 Establishment of procedure – Each participating department shall maintain a written employee grievance procedure, which has been approved by the Idaho Personnel Commission for conformity to law and this section. The procedure shall contain statements encouraging employees to use the procedure for any work-related problems, and encouraging resolution of the grievance at the lowest management level possible within the organization. Retaliation for filing a grievance, for participating as a witness, representative or impartial reviewer shall be expressly prohibited.

(07-01-87)

20.A.2 Time for filing of grievance – Any classified employee with permanent, provisional or entrance probationary status may file a grievance as defined by Section 67-5315(1), Idaho Code. An employee shall file a grievance in writing not later than five (5) working days after being notified of a grievable action or becoming aware of a grievable matter; however, if the grievance alleges an ongoing pattern of harassment or illegal discrimination, the grievance shall be considered timely if filed within five (5) working days after the last allegedly offensive action. The time limit for filing the grievance shall be extended due to the employee's illness or other approved

leave, up to five (5) days after return to the job. The department may accept a grievance that is or appears to be filed late, though the employee waives the right of review by the Commission by not complying with the time limit for filing the grievance (ref. 67-5315(3)). Department policies may provide for waiver of time elements or any intermediate step of the grievance procedure upon mutual agreement of the employee and appointing authority.

(07-01-87)

20.A.3 Discussion with supervisors and impartial reviewers – Each department grievance procedure shall encourage the employee to make a reasonable attempt to discuss a grievable issue with the immediate supervisor before the filing of the grievance. The procedure shall also provide that, after the grievance is filed, there shall be meetings with such additional levels of management as are appropriate in the department, and impartial review by a single reviewer or a panel of three. In the event the employee and the department cannot agree on the number of reviewers, the employee's preference shall be honored. Impartial reviewers shall not be employees of the grievant's department and shall be chosen from lists maintained by the Personnel Commission. Unless the parties agree otherwise, the Commission shall provide the names of two more

reviewers than are needed and each party shall strike one name.

(07-01-87)

20.A.4 Grievances involving confidential information – If the department maintains files or records that are required to remain confidential by law, the department's policy may provide that the impartial reviewer(s) shall be department employee(s) chosen from lists maintained by the Personnel Commission if the grievance involves the review of confidential information.

(07-10-88)

20.A.5 Grievances alleging sexual harassment or other illegal discrimination – Each department's grievance policy shall provide an optional alternative procedure for an employee to file grievances that allege sexual harassment or discrimination based on race, color, sex, national origin, religion, age, or handicap. The procedure shall expressly prohibit sexual harassment and discrimination. Employees shall be informed of their right to file complaints with the Idaho Human Rights Commission. The alternative procedure shall designate a specific person or persons to receive and investigate such grievances, and shall require that the investigation and resolution of them be conducted with maximum regard for confidentiality.

(06-11-89)

20.A.6 Responsibilities of impartial reviewer(s) – The impartial reviewer(s) shall determine the procedure for the impartial review, taking into account the desires of the grievant and department, and shall determine whether information is relevant to the grievance. The impartial reviewer(s) shall attempt to mediate a solution to the grievance, if possible. The impartial reviewer(s) may question the grievant, department representative, or witness. In grievances involving discipline, questioning shall be done in the presence of both parties unless both the grievant and the department agree that one or more individuals may be questioned by the impartial reviewer(s) alone. If there is a private interview by the impartial reviewer(s), a summary of the information obtained shall be provided to the grievant and department, with an opportunity to respond. At the conclusion of the review, the impartial reviewer(s) shall issue a decision explaining to the director the issue involved in the grievance, the facts believed to be true by the reviewer(s), an analysis and recommendations for the final department response to the grievance.

(07-01-87)

20.A.7 Director's decision – The grievance procedure shall be complete when the director has received the recommendations of the impartial reviewer(s) or investigator (ref. Rule 20.A.5) and mails or delivers a decision to the grievant.

(07-01-87)

20.A.8 A copy of the approved grievance procedure shall be furnished and explained to each employee with permanent, provisional or entrance probationary status in the department concerned.

(07-01-87)

20.A.9 The state personnel director shall assist departments whenever requested in the development or revision of their departmental grievance procedures.

(07-01-87)

20.B. Appeal Procedure

20.B.1 General Provisions – Every appeal filed with the Commission shall be written. The appeal shall be filed at the office of the Commission, and shall state the decision that is being appealed and the action requested of the Commission. The state personnel director shall serve a copy of the appeal on the respondent and upon the Deputy Attorney General for the Commission. Notices of appearance and notices of substitution of counsel need not be filed by Deputy Attorneys General or members of law firms already representing a party in an appeal or petition for review.

(07-01-87)

20.B.2 Time for Appeal – An appeal from a decision of an appointing authority shall be deemed to be timely filed if received or postmarked within thirty-five (35) calendar days after completion of the departmental grievance procedure. Personal

delivery or deposit in the United States mail, postage prepaid, of a written notification to the affected employee of the appointing authority's decision shall constitute completion of the departmental grievance procedure. An appeal of a decision or action of the Commission's director or staff must be filed within thirty-five (35) calendar days of personal delivery of notice of the decision or action, deposit of the notice in the United States mail, postage prepaid, or deposit of the notice in Statehouse mail.

(07-01-87)

20.B.3 Setting of Hearing – Within thirty (30) days after receiving the appeal from the Commission, the hearing officer shall consult with the parties to set a mutually agreeable date for hearing. The hearing officer may thereafter postpone or continue the hearing for good cause.

(07-01-87)

20.B.4 Notice of Hearing – The hearing officer shall send a written notice of the time, date, and place of hearing to the parties and their representatives, if any, and to the offices of the Commission at least ten (10) calendar days before the date of such hearing. Such time may be shortened with the agreement of the parties.

(07-01-87)

20.B.5 Filing of Documents – Once an appeal is referred to the hearing officer, all documents relating thereto shall be filed directly with the hearing officer during

the pendency of the appeal. Copies of all documents submitted shall be provided simultaneously to opposing counsel and unrepresented parties.

(07-01-87)

20.B.6 Prehearing Procedure – The hearing officer may schedule a prehearing conference, may set a schedule for the submission of briefs and exchange of documents, and may order prehearing discovery in accordance with the Idaho Rules of Civil Procedure.

(07-01-87)

20.B.7 Burden of Proof – In disciplinary actions, the appointing authority has the burden of proving cause for the discipline by a preponderance of the evidence. In all other actions, the appellant has the burden of proof by a preponderance of the evidence.

(07-01-87)

20.B.8 Open Hearing – Every hearing shall be public, unless the hearing officer closes the hearing for good cause. Individual parties may be represented by themselves or by an attorney.

(07-01-87)

20.B.9 Rules of Evidence – The hearing shall be informal and technical rules of evidence shall not apply to the proceeding, except that irrelevant, immaterial, incompetent, or unduly repetitious evidence or evidence protected by the rules of privilege, recognized by law, may be excluded.

(08-01-81)

20.B.10 Settlement of Appeal – If the parties agree to settle the issue(s) in dispute, a memorandum of their agreement shall be submitted to the hearing officer for approval. (Ref. 67-5316(6))

(07-01-87)

20.B.11 Post Hearing Procedure – Within ten (10) days of the filing of the findings of fact, conclusions of law and order, the parties shall have the opportunity to make any post-hearing motion permitted by the Idaho Rules of Civil Procedure. Upon receipt of a motion, the hearing officer shall provide up to ten (10) days for the opposing party to file a response. The hearing officer may decide the motion with or without a hearing. A copy of the hearing officer's decision on any motion shall be sent by U.S. mail, postage pre-paid, to the parties. The time for filing a petition for review shall commence with the date the decision is mailed by the hearing officer.

(07-01-87)

20.B.12 Procedure for Award of Attorney Fees and Costs – If the hearing officer finds in favor of the employee in whole or in part, the hearing officer shall make a finding as to whether or not the state agency acted without a reasonable basis in fact or law. If the employee is entitled to statutory attorney fees and costs, counsel for the employee shall file a memorandum of costs, including a supporting affidavit stating the basis and method of computation of the amount

claimed. The memorandum shall be filed with the hearing officer within the time requirements of Rule 12.B.11. The state agency shall then have ten (10) working days to file objections. The hearing officer shall make written findings as to the basis and reasons for the award. A copy of the memorandum of costs shall be served on the parties and filed with the Commission.

(12-10-90)

20.B.13 Factors Considered in Award of Attorney Fees and Costs – The following factors shall be considered in the determination of an award of attorney fees and costs:

The time and labor required;
The experience and ability of the attorney; the prevailing charges for like work;
The amount involved and the results obtained;
Awards in similar cases; and
Any other factor that appears pertinent to the award.

(12-10-90)

20.C Petition for Review Procedure

20.C.1 Filing of Petition for Review – A petition for review shall be deemed to be timely filed if received or postmarked within thirty-five (35) days of the hearing officer's decision. The petition shall be in writing and filed at the office of the Commission. The petition for review shall specifically cite the alleged errors of fact or law made by the hearing officer.

(07-01-87)

20.C.2 Stay of Hearing Officer's Decision – Upon the filing of the petition for review, the jurisdiction of the hearing officer in the matter is ended except for resolving post-hearing motions and awarding attorney fees and costs. The hearing officer's decision and any orders entered pursuant to Rules 20.B.11 and 20.B.12 shall be automatically stayed.

(12-10-90)

20.C.3 Nature of Hearing – The hearing of the Commission on a petition for review shall be limited to oral arguments regarding issues of law and fact as may be found in the record established before the hearing officer and any post-hearing orders. Written arguments or briefs and motions regarding the petition for review shall be allowed under such terms as the Commission may direct in its notice of hearing, which shall be issued at least twenty-eight (28) days prior to the date set for hearing.

(12-10-90)

20.C.4 Transcript – If the petition for review involves questions of fact, the appellant shall provide a full transcript of the proceedings before the hearing officer for the Commission to review. The respondent shall pay for an additional copy of the transcript for respondent's own use.

(07-01-87)

20.C.5 Requests or Postponement – Except in emergencies, a request for postponement shall be filed in writing by a party or

representative not later than seven (7) days before the scheduled hearing. The state personnel director may determine whether good cause is shown for the postponement and grant or deny the request on behalf of the Commission.

(07-01-87)

20.C.6 Decision on Petition for Review – The Commission shall file the original copy of its decision with the record of the proceedings and notify the parties immediately by U.S. Mail.

(07—01-87)

20.C.7 Record of the Proceedings – A verbatim record of the proceedings at hearings before the Commission shall be maintained either by electrical devices or by stenographic means, as the Commission may direct, but if any party to the action requests a stenographic record of the proceedings, the record shall be done stenographically. The requesting party shall pay the costs of reporting the proceedings.

(07-01-87)

20.C.8 Attorney Fees and Costs in a Petition for Review – A request for attorney fees and costs shall be made not later than the hearing on the petition for review. The memorandum and affidavit in support of the request, described in Rules 20.B.12 and 20.B.13, shall be filed with the Commission not later than ten (10) working days after the hearing. The state agency shall then have ten (10) working days to

file objections to the award. The Commission shall make findings as to the entitlement to attorney fees and costs, and determine the award, if any, in its decision on the petition for review, taking into account the factors defined in Rule 20.B.13.

(12-10-90)

20.D. Referrals from Federal Agencies on Discrimination Complaints

20.D.1 General Requirements – Upon the referral of a complaint based on alleged discrimination by a department or employee from the appropriate federal agency to the department, a departmental grievance procedure established for this purpose and an appeal to the hearing officer of the Idaho Personnel Commission shall constitute the "applicable internal review procedure" referred to in the applicable federal regulations. Except as modified herein, the procedures, remedies, and process under Section 20 remain intact.

(07-01-87)

20.D.2 Departmental Procedure – The director of the department, immediately upon receipt of the complaint, shall notify the complainant of his or her right to use the procedure set forth herein to resolve the complaint. A panel or designated person shall take testimony or written evidence regarding the complaint as is necessary

to fully discuss the circumstances surrounding the alleged act of discrimination. A written report in sufficient detail to allow subsequent reviewers to understand the allegations shall be compiled from the testimony and evidence adduced at the hearing. The person or panel may make such recommendations to the director of the department as it sees fit. The department director shall receive and consider the report and issue a decision based upon it. If the resolution is satisfactory to all parties, the federal agency will be notified the complaint has been resolved and forward a copy of the decision and acquiescence of the parties to it.

(07-01-87)

20.D.3 Petition to Hearing Officer – If the decision of the director is unacceptable to the complainant, he or she may petition for review by the hearing officer of the Idaho Personnel Commission. The petition shall state the grounds for disagreement with the director's decision and be accompanied by a copy of the report and director's decision.

(08-01-81)

Oral argument on behalf of the respective parties may be offered if it is requested. The decision of the hearing officer, for the purposes of this section, shall be the final administrative review under the "applicable internal review

procedure." If the resolution is satisfactory to all parties, the appropriate federal agency shall be notified. If the resolution is unsatisfactory, the complaint shall be referred back to the originating federal agency for resolution.

(06-30-78)

20.D.4 Time – In no event shall this process take more than sixty (60) days, except upon agreement between the parties and appropriate federal agency.

(06-30-78)

Supreme Court, U.S.
FILED
DEC 21 1993

No. 93-575

In The

Supreme Court of the United States

October Term, 1993

THE STATE OF IDAHO, MACK W. RICHARDSON, Director of the Department of Law Enforcement, and DOES I through V,

Petitioners,

v.

JOSEPH P. ARNZEN,

Respondent.

Petition For A Writ Of Certiorari To The Idaho Supreme Court

BRIEF IN OPPOSITION

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No. 93-575

In The

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October Term, 1993

THE STATE OF IDAHO, MACK W. RICHARDSON, Director of the Department of Law Enforcement, and DOES I through V,

Petitioners,

v.

JOSEPH P. ARNZEN,

Respondent.

Petition For A Writ Of Certiorari To The Idaho Supreme Court

BRIEF IN OPPOSITION

The respondent, Joseph P. Arnzen, respectfully prays that the Petition for Writ of Certiorari filed by petitioners to review the Opinion and Judgment of the Supreme Court of the State of Idaho entered in this matter be denied.

OPINIONS BELOW

The Petition for Writ of Certiorari correctly recites the decisions delivered in the proceedings below.

STATEMENT OF THE CASE

The statement of the case set forth by the petitioners is more or less accurate except for one glaring misstatement. Petitioners state that "in order to commence the discharge process, Petitioner Mack Richardson drafted a letter, dated November 3, 1989, advising Arnzen that because of his criminal conviction, the Department intended to seek dismissal". Petition at 6. Richardson in fact, and the record so reflects, did not intend to "seek" respondent's dismissal, but in fact, had decided to terminate Joseph P. Arnzen's position with the Idaho State Police. The letter of termination drafted by Richardson specifically stated that Richardson was terminating Arnzen's employment as corporal with the Idaho State Police, not merely "seeking" to or "considering" termination. *See* Petition at Appendix A, p. 13, n. 2. Thus, the position of Richardson was not that Arnzen faced termination proceedings with notice and opportunity to be heard, the position was that Arnzen must resign or be fired.

The petitioners allege that Richardson was going to merely institute a *process* to begin discharge proceedings. That is simply not what the record reflects by virtue of the November 3, 1989, letter from Richardson to Arnzen. This is borne out by findings of the Idaho Supreme Court who found that Arnzen's supervisor, Ron Moore, advised Arnzen that if he refused to resign, he would be fired. *See* Petition at Appendix A, p. 4. At no point does the record reflect that Arnzen was informed that a "process" would commence. It is obvious why petitioners want to now characterize the facts of this case as one of "beginning" a discharge process as opposed to a termination on November 3, 1989.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR THE REASON THAT THE ISSUES RAISED BY PETITIONERS DO NOT JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI.

Rule 10.1 of the Rules of the United States Supreme Court provides for granting a petition for a writ of certiorari only when special and important reasons exist for review. The authority cited by petitioners to support review of the decision of the Idaho Supreme Court fails to satisfy the requisite of Rule 10.1(a) and (b) of the Rules of the United States Supreme Court. The Idaho Supreme Court decision in this case is consistent with decisions of the United States Supreme Court as well as Federal Circuit Courts.

In sum, the issues raised by petitioners are not of such significance or import as to require review by the United States Supreme Court. Thus, respondent respectfully requests that the Petition be denied.

II.

CLAIMS BY PETITIONERS STATE OF IDAHO AND MACK RICHARDSON IN HIS OFFICIAL CAPACITY THAT THE IDAHO SUPREME COURT IMPROPERLY INTERPRETED FEDERAL LAW DO NOT PRESENT A LIVE CONTROVERSY FOR REVIEW.

The judicial power of the United States extends only to cases and controversies. U.S. Const. art. II § 2. To obtain jurisdiction, there must be an actual controversy

over an issue and not just a desire for an abstract declaration of law. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *reh'g denied*, 439 U.S. 883 (1978).

The controversy must be one which requires a declaration of the parties' rights as they stand at the time of appellate determination. *Barthuli v. Board of Trustees*, 434 U.S. 1337 (1977). The fact that a live controversy existed at the time the lawsuit was filed cannot substitute for the actual case or controversy required for jurisdiction. *Honig v. Doe*, 484 U.S. 305 (1988). When this Court reviews a state court decision pursuant to 28 U.S.C. § 1257, the Supreme Court is reviewing the judgment. If resolution of a federal question would not affect the judgment, there is no question for the Court to address. *Coleman v. Thompson*, 111 S.Ct. 2546 (1991).

The petitioners named in the Petition for Writ of Certiorari are the State of Idaho and Mack Richardson in his official and individual capacity. *See* Petition at 1. It is undisputed that the Idaho Supreme Court affirmed the trial court's complete dismissal of Arnzen's claims against the State of Idaho and Mack Richardson in his official capacity. *See Arnzen v. State of Idaho*, 854 P.2d 242 (Idaho 1993) (reprinted at Appendix A1-20 to Petition).

It is apparent from the petition that petitioners State of Idaho and Mack Richardson in his official capacity have joined for the sole ultimate purpose of seeking an advisory opinion regarding the Idaho Supreme Court's treatment of *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985), the exhaustion of remedies defense and the constitutionality of Idaho's administrative procedures for state employee grievances. Since the Idaho Supreme Court

completely dismissed the State of Idaho and Mack Richardson in his offical capacity from the case, this Court is without the ability to provide these petitioners any further relief as action by this Court would not affect the judgment with respect to them.

Further, the Idaho Supreme Court's interpretation of *Loudermill* was limited to the discussion of Mack Richardson's qualified immunity as an *individual* defendant. The Idaho Supreme Court did not apply or even discuss *Loudermill* in affirming the dismissal of claims against the State of Idaho and Mack Richardson in his official capacity as no application of *Loudermill* was necessary. *See Arnzen*, 854 P.2d at 246-47. Dismissal of Arnzen's claims against these petitioners was undertaken in reliance on this Court's holding in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) and the Eleventh Amendment to the United States Constitution. *See Arnzen*, 854 P.2d at 246-47.

With respect to the question of exhaustion of administrative remedies, the Idaho Supreme Court did not address this issue with respect to the due process claims against petitioners State of Idaho and Mack Richardson in his official capacity, and this question was not presented on appeal below. *See Arnzen*, 854 P.2d at 246. The exhaustion defense was utilized only to affirm the trial court's grant of summary judgment dismissal of Arnzen's state law wrongful discharge claims. *Id.* at 249-50. Again, it was not necessary for the Idaho Supreme Court to consider the exhaustion defense in the context of due process claims against the State of Idaho and Mack Richardson in his official capacity because a complete dismissal was afforded under *Will*.

Petitioner State of Idaho further attempts to entice this Court to grant review by raising the specter of the potential invalidity of Idaho's administrative regulations and statutes relating to state employee disciplinary procedures under the Idaho Supreme Court's ruling. *See* Petition at 13. This argument is entirely meritless and simply does not present a justiciable controversy for adjudication with respect to petitioners State of Idaho and Mack Richardson in his official capacity.

It is undisputed, based upon the record below, that the constitutionality of the state regulations and statutes in question was never addressed by the Idaho Supreme Court or challenged by Arnzen. In fact, far from implicating constitutional infirmities, the Idaho Supreme Court relied on the existence of the procedures as an additional ground for dismissal of wrongful discharge claims against the State of Idaho and Mack Richardson in his official as well as individual capacity. *See Arnzen*, 854 P.2d at 249-50.

The constitutionality of the regulations and statutes is not an issue with respect to the remaining petitioner, Mack Richardson in his individual capacity.

There is no live controversy between respondent and petitioners State of Idaho and Mack Richardson in his official capacity. The Idaho Supreme Court's action in affirming the trial court's summary judgment rendered all issues as to these petitioners moot. Accordingly, the writ of certiorari should be denied to petitioners State of Idaho and Mack Richardson in his official capacity.

III.

THE ISSUE OF WHETHER DEFENDANT MACK RICHARDSON IN HIS INDIVIDUAL CAPACITY VIOLATED ARNZEN'S DUE PROCESS RIGHTS TURNED ON INTERPRETATION OF STATE STATUTES AND REGULATIONS AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION FOR REVIEW.

The interpretation of state law by the highest state court in that state is binding on the United States Supreme Court and does not present a federal question for review. *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468 (1989); *Missouri ex rel. Hurwitz v. North,* 271 U.S. 40 (1926).

In *Landmark Communications, Inc., v. Virginia,* 435 U.S. 829 (1978), this Court discussed this well-settled rule in a controversy involving interpretation of a state statute, wherein this court stated:

> Landmark argued below that the [state] statute was unclear. . . . The Supreme Court of Virginia . . . construed the statutory language so as to encompass appellant. Although a contrary statutory construction might well save the statute from constitutional invalidity, *"it is not our function to construe a state statute contrary to the construction given it by the highest court of a State." O'Brien v. Skinner,* 414 U.S. 524, 531, ...

Landmark, 435 U.S. at 829 n. 9 (emphasis added).

Petitioners ask this Court to grant review in the instant case because:

> In the Idaho Supreme Court's May 13, 1993 opinion, it was concluded, as a matter of law, that Plaintiff Joseph Arnzen's constitutional

> right to procedural due process was violated. *See* 854 P.2d at 248. . . . The basis of the ruling was the conclusion [Arnzen's] right to continued public employment was impaired when Defendant Mack Richardson drafted a letter notifying Arnzen that the Department . . . intended to seek his dismissal.
>
> * * *
>
> In order to support its conclusions, the Idaho Supreme Court improperly expanded federal law to require notice and hearing under *Loudermill, before a decision is made to institute termination proceedings.*

Petition at 7, 13 (emphasis added).

On examination of the *Arnzen* decision and the Idaho Supreme Court's application of *Loudermill* to the issue of qualified immunity, it is abundantly clear that the court did not improperly expand federal law and that the ultimate question turned on interpretation of state law.

The first prong of the qualified immunity test required the Idaho Supreme Court to determine whether there was a clearly established law Richardson as an individual violated. The Idaho Supreme Court applied *Loudermill* as follows:

> It was equally well-established that due process requires, at a minimum, notice of the contemplated action and notice of the basis and evidence relied upon for the contemplated action, and an opportunity to respond. The first component of the due process requirement, notice, may be an oral or written notification of the charges against the employee and the basis and evidence supporting those charges. The second

> component of the due process requirement, opportunity to respond, is an opportunity for the employee, either in person or in writing, to present his or her reasons "why *proposed* action should not be taken. . . . "

Arnzen, 854 P.2d at 247 (emphasis in original, citations omitted). There is no allegation by petitioners that the foregoing statements of the Idaho Supreme Court regarding *Loudermill* are in any manner improper or incorrect as to the requirements of notice and hearing prior to termination.

Following the Idaho Supreme Court's discussion of *Loudermill* as set forth above, the Idaho Supreme Court reached the conclusion the petitioners are now alleging was improper:

> Of course, as our emphasis indicates, the opportunity to respond must take place before the administrative action occurs. More specifically, Arnzen must have been given an opportunity to respond to charges against him before the State made the decision to terminate him from employment with the Department.

Arnzen, 854 P.2d at 247 (citations omitted). The conclusion that notice and opportunity to be heard occur *prior* to termination is consistent with this Court's holding in *Loudermill*. As noted by petitioners, this Court recognized in *Loudermill* that a tenured public employee should be given the opportunity to "invoke the discretion of the decision maker . . . *before* the termination takes effect." *Loudermill*, 470 U.S. at 543 (emphasis added); *see also*, Petition at 12.

The Idaho Supreme Court properly turned its focus to determination of the point in time when termination took effect, finding that the decision to terminate Arnzen occurred on November 3, 1989. *Arnzen*, 854 P.2d at 248. This was the date Mack Richardson drafted the termination letter, the date Ron Moore, Arnzen's immediate supervisor, was advised by the "Boise office" to tell Arnzen he could resign or be terminated, the date Ron Moore told Arnzen "if he refused to resign, he would be fired", and the date that Ron Moore told Arnzen that filing a grievance would be a futile act and that "you know they are never giving you your job back." *Arnzen*, 854 P.2d at 244-45.

Determination of the effective date of termination for a classified public employee in Idaho is a question addressed solely by state law, which is admitted by petitioners. *See* Idaho Code § 67-5315(2) (1989) (reprinted at Appendix A30-31 of Petition); *also* Petition at 10 ("[U]nder the procedural protections provided by state law, Arnzen's dismissal was not final when the November 3rd letter was signed.") While Idaho Code § 67-5315(2) provides that disciplinary actions shall not be "effective" until the employee has the opportunity to complete administrative grievance procedures, the Idaho Supreme Court interpreted the facts of the instant case and Idaho law to conclude that petitioner Mack Richardson's actions amounted to termination of Arnzen on November 3, 1989, so as to effectively preclude pre-termination invocation of the decision maker's discretion.

Petitioners' attempts to characterize their November 3, 1989, conduct as inchoate by use of the terms "proposed",

"contemplated", as an "inten[t] to seek [Arnzen's] dismissal", or "institut[ion] of discharge proceedings", ignore the facts in the record and the Idaho Supreme Court's decision based upon state law. *See* Petition at 6, 7, 8 at n. 1, 9. There was nothing "proposed" about Richardson's decision to terminate Arnzen. *See Arnzen*, 854 P.2d at 248, n. 2 ("I am terminating your employment. . . . "). There was a substantial factual basis for the Idaho Supreme Court to find from Mack Richardson's November 3, 1989, letter, and conduct and statements by Ron Moore that the decision to terminate was "effective" on that date. Ordinarily, the United States Supreme Court will not grant certiorari merely to review evidence or inferences drawn therefrom. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951).

Further, the Idaho Supreme Court could have found that the first prong of the qualified immunity was not met due to Mack Richardson's failure to follow Idaho administrative Procedures. Petitioners have as much as admitted that state procedures were violated wherein petitioners state:

> Under the Idaho Personnel Commission Act, Idaho Code § 67-5301, *et seq.*, and . . . regulations of the Idaho Personnel Commission, *state agencies are required to provide an employee written notice of contemplated disciplinary action*, which must outline the nature of the charges, the discipline sought, and a brief explanation of the evidence the employer is considering. *See* 28 IDAPA § 19.A.5.a. *The termination letter in the present case is the notice mandated by the Personnel Commission.*

Petition at 8 n. 1 (emphasis added).

Petitioners rely on Mack Richardson's November 3rd letter as the notice mandated under the regulation. However, it is undisputed that this letter was never presented to Arnzen. Richardson opted instead to send Ron Moore to threaten Arnzen with termination if Arnzen did not immediately resign. *See Arnzen*, 854 P.2d at 244-45. Even if the letter had been sent, it violated Idaho Code § 67-5315(2) and 28 IDAPA § 20.A.2, as the letter provided that the termination was "effective" November 6, 1989, three (3) days from the date of the letter. *See Arnzen*, 854 P.2d at 248, n. 2. Under the administrative grievance procedure and petitioners' theory, the termination could not have been effective until a minimum of five (5) days following the time Arnzen was notified of a grievable matter. *See* 28 IDAPA § 20.A.2 (reprinted at Appendix A38-51 to Petition).

The Idaho Supreme Court correctly interpreted *Loudermill*. In addition, the ultimate issue of which petitioners complain turned on the Idaho Supreme Court's interpretation of Idaho statutes and administrative regulations. There is no substantial federal question for review presented in the petition.

IV.

THE IDAHO SUPREME COURT'S HOLDING DOES NOT CONFLICT WITH FEDERAL 9TH CIRCUIT COURT OF APPEALS' RULINGS AND THERE IS NO FEDERAL QUESTION PRESENTED FOR REVIEW.

Petitioners' arguments that review should be granted due to an alleged conflict between the Idaho Supreme Court in *Arnzen* and the courts in *Bignall v. North Idaho*

College, 538 F.2d 243 (9th Cir. 1976) and *Correa v. Nampa School District No. 131*, 645 F.2d 814 (9th Cir. 1981), are without merit and do not present a substantial federal question for review.

Petitioners' arguments regarding exhaustion of administrative remedies discussed in *Bignall* and *Correa* can only apply to exhaustion of *pre-termination* remedies in the instant case. Arnzen was a classified state employee with a vested property interest in continued employment and thus entitled to notice and hearing prior to termination. *See Arnzen*, 854 P.2d at 247-48. If the final decision to terminate was effective on November 3, 1989, which was the implicit if not the express decision of the Idaho Supreme Court under Idaho law, the availability of post-termination grievance procedures is irrelevant to the issue of qualified immunity.

In addition, even assuming arguendo a conflict did exist in the holdings of the Idaho Supreme Court and federal Ninth Circuit Court of Appeals' rulings, it is well settled that state courts are not bound to follow decisions of lower federal courts on questions of federal law. *See, e.g., U.S. ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Owlsey v. Peyton*, 352 F.2d 804 (4th Cir. 1965). Failure of a state court to follow a lower federal court's interpretation of federal law does not present a federal question for review. *Winona & St. Peter R.R. Co. v. Town of Plainview*, 143 U.S. 371, 390 (1891).

Therefore, there are no substantial federal questions for review presented by petitioners with respect to this issue.

V.

THE IDAHO SUPREME COURT DID NOT ERR IN FINDING THAT DEFENDANT MACK RICHARDSON'S ACTIONS VIOLATED CLEARLY ESTABLISHED LAW.

Petitioners seek review of the Idaho Supreme Court's decision on grounds that the Idaho Supreme Court erred in finding that the petitioner Mack Richardson in his individual capacity violated clearly established law. *See* Petition at 17.

Petitioners argue that defendant Mack Richardson had qualified immunity because Idaho *tort law* regarding claims of coerced constructive discharge was unsettled at the time of the termination. *See* Petition at 19-20. Petitioners also rely on the assertion that the issue of whether a due process violation occurs when an employee is given the "option" to resign prior to termination had not been decided by this Court. *See* Petition at 20.

These arguments are specious and do not present a substantial federal question justifying a grant of review in the instant case.

Whether Mack Richardson's actions violated state common law regarding wrongful discharge claims is irrelevant to the constitutional due process inquiry in the instant case. The proper inquiry under *Harlow v. Fitzgerald*, 457 U.S. 800 (1981), undertaken by the Idaho Supreme Court, focuses on whether Richardson violated *"clearly established statutory or constitutional rights* of which a reasonable person would have known." *Harlow*, 457 U.S. at 818 (emphasis added).

In the instant case Arnzen did have clearly established constitutional, statutory and administrative rights which, based on the record before this Court, were violated.

It is undisputed on the record that Arnzen was a classified state employee under Idaho statutes and common law. Such an employee could only be terminated for cause, and with the right of notice and opportunity to be heard prior to termination. *Arnzen,* 854 P.2d at 247-249.

Further, as a classified employee, it is undisputed that Arnzen was entitled to the rights and benefits of Idaho statutes and regulations governing disciplinary actions and grievance resolution. *See* Idaho Code § 67-5315(1) (reprinted at Appendix A30 to Petition). Petitioners have admitted that Idaho law provided the procedural mechanism by which respondent could be disciplined and that respondent was entitled to, at a minimum, written notice of the "contemplated" discipline. *See* Petition at 8, n. 1; *also* 28 IDAPA § 19.A.5.a (reprinted at Petition, p. 3).

Nothing in 28 IDAPA § 19.A.5.a, pointed to by petitioners as mandatory on them, authorized Richardson to notify Arnzen of the decision to terminate his employment orally. Further, nothing in the procedures allowed Richardson to implement an "effective" termination less than at least five (5) days after notice of the decision to terminate. Nothing in Idaho law and procedures empowered Richardson, once disciplinary action was contemplated, to ignore the written notice provisions of 28 IDAPA § 19.A.5.a and instead send agency personnel to meet with Arnzen and command that Arnzen resign or

face termination. Nothing in the state administrative procedures empowered Richardson to, on behalf of the State of Idaho, provide Arnzen an "option" to resign under threat of immediate termination. Nothing in the state administrative procedures authorized Richardson or Ron Moore to dissuade Arnzen from filing a grievance by convincing him the action would be futile.

Petitioner Mack Richardson in his individual capacity cannot create a substantial federal issue for review where the undisputed facts show that he did not even follow clearly established state administrative procedures designed to protect respondent's rights as a classified state employee. State procedures were clear, just as it is clear those procedures applied to respondent as a classified state employee. It is equally clear that the procedures were not followed.

Therefore, the petition should be denied.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to review the Opinion and Judgment of the Supreme Court of the State of Idaho should be denied.

Respectfully submitted,

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